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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 42

JOHN LEE,

Petitioner,

vs.

PAUL J. MADIGAN, Warden, Federal Penitentiary, Alcatraz, California.

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit, filed October 11, 1957, is found in the record, pages 33-40. The opinion of the Trial Court is unrecorded but is found in the record, pages 28-31.

Jurisdictional Statement

This appeal is taken from a judgment of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, entered October 11, 1957 (R. 40), affirming a decree of the United States District Court, Northern District of California, Southern Division, San Francisco, California, entered January 30, 1957, dismissing petitioner's petition for a writ of habeas corpus (R. 28). Jurisdiction is therefore invoked under Sections 2241, 2242 and

2243 of Title 28, United States Code. Appeal in habeas corpus proceedings is provided by Section 2253 of Title 28, United States Code.

Statutes Involved

The applicable statutes are:

1. Article of War 2(e), 10 U.S.C. 1473, Appendix A;
2. Article of War 92, 10 U.S.C. 1564, Appendix B.

Specification of Error

1. Petitioner challenges the ruling of the District Court in denying the issuance of a writ of habeas corpus as being a denial of due process of law under the Fifth and Sixth Amendments of the Constitution of the United States for the reason that petitioner, having been dishonorably discharged from the United States Army on June 12, 1947, some two years prior to his court-martial on September 13, 1949, was a civilian and therefore not amenable to court-martial jurisdiction.

2. Petitioner challenges the ruling of the District Court in denying the issuance of a writ of habeas corpus as being a denial of due process of law under the Fifth and Sixth Amendments of the Constitution of the United States for the reason that petitioner's court-martial for murder at Camp Cook, California, on September 13, 1949, was in violation of the 92nd Article of War, 10 U.S.C. 1564.

Questions Presented

1. Under the Fifth and Sixth Amendments of the Constitution, does the military have courts-martial jurisdiction over capital offenses committed by a civilian serving sentence in a military prison?

2. Since the military is deprived of jurisdiction over murder committed within the geographical limits of the United States "in time of peace", was petitioner's conviction on September 13, 1949, "in time of peace"?

Statement of Case

Appellant is now imprisoned by the Warden, Federal Penitentiary on Alcatraz Island, California.

On October 23, 1942, he was inducted into the United States Army. On May 27, 1946, he was court-martialed in Paris, France, on charges of robbery and assault; he was convicted and sentenced to a dishonorable discharge from the Army and sentenced to twenty years of confinement at hard labor. On June 12, 1947, the sentence having been approved, petitioner was dishonorably discharged from the Army. He was returned to Camp Cook, California, from France to serve the sentence.

On June 10, 1949, three fellow prisoners stabbed another prisoner to death. The petitioner, Lee, took no part in the incident, and, in fact, attempted to prevent it as shown in the dying victim's declaration which is attached as an exhibit in the record of the court-martial. Nevertheless, the petitioner was tried by Army General Court-Martial on September 13, 1949, along with the three active participants, and was convicted and sentenced to death.

The death sentence which had been adjudged against petitioner was commuted to life imprisonment, to begin to run consecutive upon completion of his then existing sentence. On January 27, 1953, appellant, Lee, became eligible for parole from his twenty-year sentence, but he was not considered for such parole because the first sentence of twenty years had merged with the second sentence to make one life sentence, and hence to deprive the United States Board of Parole of jurisdiction until 1957.

On October 18, 1954, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. An order was entered on October 22, 1954, dismissing appellant's petition as premature (R. 4). An appeal was taken from such order and was heard before the United States Court of Appeals for the Ninth Circuit on July 28, 1955. On September 14, 1955, the Court of Appeals rendered an opinion affirming the order of the lower court, to the effect that appellant's petition was premature. *Lee* v. *Swope*, 225 F2 674 (R. 6). A petition for a writ of certiorari was filed with the United States Supreme Court on December 30, 1955, appealing from such order. On February 7, 1956, certiorari was denied (R. 7). On September 20, 1956, the Army Clemency Board remitted the unexpired portion of the petitioner's first sentence so that he became imprisoned under the life sentence which is here being attacked.

On October 15, 1956, petitioner again filed a petition for a writ of habeas corpus, wherein he challenged the jurisdiction of the Army General Court-Martial which convicted him on December 13, 1949. On January 23, 1957, the District Court ordered that the issuance of a writ of habeas corpus be denied (R. 28). Appeal was taken from such order and was heard before the United States Court of Appeals for the Ninth Circuit on July 9, 1957. On October 11, 1957, the Court of Appeals rendered an opinion affirming the order of the District Court, denying petitioner's application for a writ of habeas corpus (R. 40).

A petition for certiorari to the Supreme Court of the United States was filed December 10, 1957, and certiorari was granted on March 17, 1958 (R. 41).

Summary of Argument

The argument hereinafter set forth is divided into two general parts. The first argument is entitled "The Constitutionality of Article of War 2(e)". It is the contention of your petitioner that though he was a military prisoner at the time of his court-martial, he was not amenable to court-martial jurisdiction for a capital offense and that Article of War 2(e), Appendix A, purportedly conferring such jurisdiction, is unconstitutional in that petitioner, having been discharged from the military, was no longer a member of the land and naval forces, but was a member of the civilian class and thus entitled to the guarantees under the Fifth and Sixth Amendments of the United States Constitution.

The second argument is entitled "Time of Peace". In the 92nd Article of War, Appendix B, the Congress deprived the military of jurisdiction over murder committed within the geographical limits of the United States in time of peace. It is your petitioner's contention that his court-martial for murder at Camp Cook, California, in 1949 was in time of peace; that the Congress, in enacting the 92nd Article of War, intended the term "time of peace" in its common and ordinary meaning, rather than in its technical meaning, and that the United States was in "time of peace" in September of 1949.

ARGUMENT

Constitutionality of Article of War 2(e)

Article of War 2(e) provides that among the persons subject to military law are "all persons under sentence adjudged by courts-martial". This article in its present form was first enacted in August 29, 1916 (39 Stat. 650), by the 64th Congress. It was carried over verbatim into the revision of the Articles of War by the 66th Congress on June 4, 1920 (41 Stat. 787), and by the 80th Congress on June 24, 1948 (62 Stat. 627).

The first Articles of War were the Revolutionary Articles of War of 1776. These articles were adopted by reference by the Continental Congress in 1786 and by the First Congress in 1790 (First Congress, Second Session, Ch. 10, Sec. 13). The Articles of War enacted in 1806 were substantially a verbatim re-enactment of the Revolutionary Articles.

The Articles of 1806 make no provision relating to jurisdiction by the military over discharged prisoners. In fact, the only articles of these original Articles of War relevant to in personum jurisdiction are Article 60 (2 Stat. 366) and Article 96 (2 Stat. 371). Article 60 provides:

> "All sutlers and retainers to the camp and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war".

Clearly, under this article the military would have no jurisdiction over a discharged prisoner, as such prisoner could hardly be said to be "serving with the armies of the United States in the field".

Article 96 provides:

"All officers, conductors, gunners, matrasses, drivers, or other persons whatsoever, receiving pay, or hire, in the service of the artillery, or corps of engineers of the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers of the other troops in the service of the United States".

Since a discharged soldier serving sentence is not receiving pay nor in the hire of the army, he could not be held amenable to military jurisdiction under this article.

The next enactment of the Articles of War dealing with jurisdiction were in the Revised Statutes of 1873 by the 43rd Congress (Title XIV, Ch. 5). In this chapter the Congress completely revised the Articles of War. The only two articles dealing with such jurisdiction were Articles 63 and 64. Article 63 contained substantially the same provisions as Article 60 of the Articles of War of 1806; Article 64 provides:

"All officers and soldiers of any troop, whether militia or others, mustered and in pay of the United States, shall at all times and in all places be governed by the Articles of War and shall be subject to trial by court-martial."

However, on March 3, 1873, Congress enacted legislation which was not a part of the Articles of War, setting up the military prison at Rock Island (17 Stat. 548; Title XIV, Ch. 6) and Section 1361 thereof provides as follows:

"All persons under confinement in said military prisons undergoing sentence of courts-martial shall be liable to trial and punishment by courts-martial under the

Articles of War for offenses committed during said confinement".

Thereafter, Congress enacted similar legislation setting up the military prison at Fort Leavenworth, Kansas, and similarly provided for military jurisdiction over military prisoners (18 Stat. 48; 186).

The first attacks on military jurisdiction over discharged prisoners were cases involving persons who were tried under the provisions of the above mentioned sections.

The first of these was that of *Ex parte Wildman*, Fed. Case No. 17,653a, decided in 1876 by Judge Foster, United States District Judge for the District of Kansas. In this case the petitioner was court-martialed for an escape from Fort Leavenworth where he was serving sentence as a discharged prisoner. The District Judge held that the military had court-martial jurisdiction and denied the writ. An appeal from this decision to the United States Supreme Court was prevented by a final successful escape by the petitioner.

The next case dealing with this situation was that of *In re Craig*, 70 Fed. Rep. 969. This case was tried before a Circuit Judge for the District of Kansas on June 6, 1895. Petitioner had been convicted of desertion and sentenced to a "dishonorable discharge from service and to confinement at hard labor in Leavenworth Military Prison for a term of two years and six months". While serving this sentence petitioner "assaulted" the commanding officer "with intent to kill". He was court-martialed and sentenced to ten years. The petitioner, relying on the Fifth Amendment, contended that Section 1361 was unconstitutional; that since he had been discharged from the army prior to his second court-martial, he was a civilian and entitled to the guarantees of the Fifth Amendment. The Circuit

Judge, in upholding the constitutionality of Section 1361, stated in part:

> "If a reasonable doubt exists as to whether an act of Congress is constitutional or otherwise, the inferior courts of the United States will give effect to its provisions until it has been held to be void by the court of last resorts."

It does not appear that an appeal was taken from this decision. Therefore, since the court's ruling on the issue was at least partially based on the premise that it could not rule otherwise until the Supreme Court had ruled on the constitutional issue, it is of little value in resolving our problem.

These and subsequent cases dealing with military jurisdiction over discharged prisoners cite the case of *In re Bogart,* 2 Sowy. 396, Fed. Case No. 1596, decided by the Circuit Court in California in December of 1868. This case did not deal with jurisdiction over a discharged military prisoner, but dealt with military jurisdiction over servicemen who were discharged after commission of a military offense. Though there was some dispute as to whether the petitioner had been effectually discharged, the case was similar factually to the recent Supreme Court case of *U. S. ex rel. Toth* v. *Quarles,* 350 U.S. 11. Petitioner contended that the military lost jurisdiction by discharging him; that the mere fact that the offense occurred while he was in the service did not give the military the jurisdiction to try him after such discharge. The court held that since the offense "arose" while the petitioner was in the land and naval forces there was courts-martial jurisdiction over him, even though he was separated from the service prior to charges being preferred. Since this case did not deal with jurisdiction over a discharged prisoner and since its holding has since been overruled by the *Toth* case, *supra,*

it is of no value to us in determining the issues in the instant case.

During this period a Colonel W. Winthrop was serving as Assistant Judge Advocate General of the Army. In such capacity, in 1895 he wrote the final revision of his *"Digests of Opinions of the Judge Advocate General of the Army"*. The first of these digests prepared by Colonel Winthrop appeared in 1865. It was supplemented periodically with selected opinions rendered by Judge Advocate Generals from that date until the publication of the final edition in 1895. The scholarly learning of Colonel Winthrop in the field of military law is so renowned that he has since been referred to by the Supreme Court as "an expert on military jurisdiction" and the "Blackstone of Military Law".

Colonel Winthrop's great wisdom in the field of military law is borne out by his writings in the above mentioned digest. In the 1895 edition of his digest, commencing on page 323, he discusses various persons who are, and those who are not, subject to courts-martial jurisdiction. In the first subparagraph of paragraph 5 he arrives at the same conclusion as the Supreme Court in the case of *Toth* v. *Quarles, supra.* In the remaining subparagraphs of paragraph 5 his conclusions are the same as the Supreme Court in *United States ex rel. Hirshberg* v. *Cooke,* 336 U.S. 210. In numbered paragraph 6 his conclusion is the same as the Supreme Court in *Carter* v. *McClaughry,* 183 U.S. 365. In numbered paragraph 7 the Colonel arrived at the same conclusions as the majority and the concurring majority in the recent Supreme Court case of *Reid* v. *Covert* and *Kinsella* v. *Krueger,* 354 U.S. 1.

Colonel Winthrop's perception in this field of law becomes of added significance when it is considered that he wrote this Digest many years prior to most of the above cited decisions.

In the paragraph numbered 8, Colonel Winthrop deals with the issue presently before this Court. The Colonel states as follows:

> "Any statute by which any class of civilians is attempted to be made amenable to trial by court-martial for offenses committed while civilians and in time of peace, is necessarily unconstitutional, XLII, 250. Thus held that Sec. 1361, Rev. Sts., could not properly be construed as applying to prisoners at the Leavenworth Military Prison who had been sentenced to be dishonorably discharged in connection with their confinement, and as a preliminary thereto, and whose discharge had duly taken effect; that to interpret such provision as intended to include and apply to a class of prisoners no longer in the military service, but become civilians by discharge therefrom, while not a construction made necessary by the terms of the statute, was to attribute to Congress an unconstitutional enactment, and therefor inadmissible. So, in several cases of prisoners thus confined at this prison as civil convicts after discharge, and sought to be brought to trial for escape or attempt to escape, insubordination, assault, etc., committed while so confined,—held that the accused were not amenable to trial by court-martial, but, (unless their offenses were cognizable by the civil courts,) were legally punishable only by being subjected to the discipline of solitary confinement prescribed by Sec. 1353, Rev. Sts., for convicts disobeying orders or violating the regulations of the institution. XXXVII, 214; XLI, 293, 322; XLII, 132, 155, 249".

By footnote, Colonel Winthrop notes that the District Judge in *Ex parte Wildman, supra,* arrived at a contrary conclusion. However, he also notes that "with these opin-

ions of the Judge Advocate General's Office has never been able to concur . . .".

Returning to the legislative enactments in this field, the Congress, on June 18, 1898 (30 Stats. 484, C. 469, Sec. 5), enacted the following statute:

> "Soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice."

It was while this statute was in effect that the Supreme Court decided the case of *Carter* v. *McClaughry* (1906), 183 U.S. 365. The *Carter* decision was one of the major decisions relied upon by the lower court in denying the writ. Carter was a captain in the army and was tried and convicted by court-martial on four charges (conspiracy to defraud, causing a false report to be made, conduct unbecoming an officer and embezzlement). He was sentenced to a dismissal, fined and imprisoned for five years. In his petition to the United States Supreme Court, Carter gave as his fourth assignment and error, "that the punishment and fine and imprisonment were illegal because *inflicted* after Captain Carter had ceased to be an officer of the army". (Emphasis added.)

It appears that the theory of this assignment of error was that when the President approved that portion of Carter's sentence adjudging a dismissal, it deprived the military of jurisdiction to carry out the remainder of the sentence, viz., confinement and fine. In answer to this argument the Supreme Court held:

> "The accused was proceeded against as an officer of the army and jurisdiction attacked in respect of him as such, which included not only the power to hear

and determine the case but the power to execute and enforce the sentence of the law."

The court then went on to make the following statement which has often been quoted, and which is strongly relied upon by the respondents in this case:

> "He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement, he was liable to trial and punishment by court-martial under the rules and articles of war."

It is submitted that this last mentioned general statement was either dicta or not intended by the Supreme Court to have the broad general interpretation which it has subsequently been given.

The holding of the court in the *Carter* case is not in conflict with your petitioner's argument. Your petitioner was not "proceeded against as an . . . [enlisted man] . . . of the army", but as a person who had been discharged from the army some two years prior to the convening of the court-martial, the jurisdiction of which he is attacking.

The petitioner in the *Carter* case admitted that the court-martial had jurisdiction over his person at the time the court was convened. At page 381 the court states:

> "Jurisdiction over the person is admitted but it is argued that there was not jurisdiction over the subject matter".

In reading the *Carter* opinion, it is apparent that it was Carter's contention that the military lacked power to carry out the sentence of the court-martial after it had executed that portion of such sentence adjudging a dismissal. It is noted that the court, at page 382, states:

"The different provisions of the sentence took effect concurrently while the accused was under the control of the military authorities of the United States as a Commissioned Officer of the United States Army. The date of the order of dismissal, of the infliction of the fine and of the beginning of the imprisonment, were the same date".

It is submitted that the *Carter* decision should be limited to the holding that was intended—the holding that was intended was that once a particular court acquires valid jurisdiction, that jurisdiction continues not only to the end of the trial but also until its sentence has been carried out. *Coleman* v. *Tennessee*, 97 U.S. 509; 14 *Am. Jur., Courts, Section* 195; *Manual for Courts-Martial, 1951*, Para. 11d.

It is interesting to note that the United States Court of Military Appeals recognizes the distinction between the *Carter* decision and the contention of your petitioner. In the recent case of *U. S.* v. *Speller*, 1947, 24 C.M.R. 173, the court was dealing with an accused who was released from the service administratively after his conviction by court-martial, but before the completion of appellate review. The court quoted all of the above language of the *Carter* case, including the language from the *Carter* case quoted by the court below in denying your petitioner's writ. However, the Court of Military Appeals quoted this language from the *Carter* case as standing for the proposition that jurisdiction having attached by commencement of action with a view to trial, continues for all purposes of trial, sentence and punishment. After citing the *Carter* and other decisions, the Court of Military Appeals went on to state:

"While it is true that when a serviceman's relationship with the military service has been terminated and he

reverts to his civilian status, the service to which he belonged has lost jurisdiction to initiate criminal proceedings against him, it does not follow that matters in the process of appeal must be dismissed. After the service relationship terminates, if the offender is to be tried for an offense committed prior to his return to a civilian status, he must be tried in a civilian court. That is what Toth v. Quarles, 350 U.S. 11, 100 L.Ed. 8, 76 S.Ct. 1, holds and, pretermitting unusual circumstances not presently facing us, we do not believe the method by which the termination is accomplished makes one whit of difference. But that is not to say that once an accused is tried and convicted by a court-martial which had jurisdiction, his reversion to a civilian status sets aside his conviction and requires that he be given a second chance before a jury in a civilian court. On the contrary, once a prosecution starts legally in military courts, it is entitled to be completed in the manner provided by the law which governs them."

Judge Quinn, in dissenting, stated:

"As far as I have been able to determine, the view that court-martial jurisdiction survives a discharge appears to be based upon a passage in the opinion of the United States Supreme Court in Carter v. McClaughry, supra."

"The quotation from the Carter case is too narrow a ledge upon which to support the claim of continuing jurisdiction where there has been an actual discharge not as a result of a court-martial sentence. Both cases cited by the Supreme Court are cases in which the regular period of service had apparently expired, but no valid discharge had been issued before the completion of the court-martial proceedings. As a matter

of fact, Coleman v. Tennessee, 97 U.S. 509, 24 L.Ed. 1118 (1879), supports the view that, had a valid discharge been issued, the court-martial's sentence could not legally be executed".

Your petitioner has no quarrel with the holding in the *Carter* decision. In his case, your petitioner argues that the court-martial which tried him at Camp Cook, California, never acquired jurisdiction over his person in the first instance.

Subsequent to the *Carter* case the Congress, in 1916, enacted Article 2(e), *supra*, in its present form, bringing the statute, for the first time, within the Articles of War.

There are several interesting factors to be noted in this growth of court-martial jurisdiction over discharged prisoners. Prior to the enactment of Section 1361, *supra*, it appears that there was no jurisdiction over such persons. After the enactment of Section 1361, such jurisdiction, if it did exist, was limited strictly to such prisoners confined at Leavenworth and Rock Island. In *G.C.M.O. 4 War Department, 1871*, the Secretary of War held that Section 1361 applied only to military prisoners held in confinement at Leavenworth. The Secretary declared inoperative a court-martial sentence received by a discharged prisoner who had escaped from Alcatraz Island.

In the face of repeated holdings by the Judge Advocate General and the Secretary of War that there was a constitutional defect in such enactments, the Congress, in 1898, expanded the jurisdiction from certain designated *military* prisons to *all* prisons. In its present form, Article 2(e) subjects all persons serving sentence under court-martial conviction to court-martial jurisdiction, regardless of the offense and regardless of the prison. Thus, a person in a position such as your petitioner who is now serving a

court-martial sentence in a federal *civilian* prison could be taken from such prison and tried for any of the offenses enumerated in the Uniform Code of Military Justice. For example, suppose a prisoner serving a court-martial sentence at Alcatraz were to kill another prisoner. If the local authorities so desired, he could be turned over to the military for courts-martial and tried without the benefits of his constitutional guarantees.

An examination of the Congressional reports prior to the 1898 enactment of the predecessor to Article 2(e) indicate that Congress did not intend by this statute to give to the military jurisdiction to try discharged prisoners for civilian capital offenses. From reading such reports, it is obvious that what Congress intended was to give the military jurisdiction to try prisoners for infractions of prison rules. As an example, see U. S. 3465 House Report No. 2132, 54th Congress, First Session, at page 2, which states:

> "Section 4 of the bill is new, its purpose being to provide by affirmative enactment that soldiers sentenced by courts-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice. The necessity for such an enactment seems obvious. It avoids any conflict as to jurisdiction between the civil and military authorities in case the convict should, during his term of imprisonment, commit some other crime rendering him liable to further punishment. The probability would be that any offense so committed would affect the military establishment and be a breach of military discipline rather than purely a violation of the laws enforcible by civil authority."

In U. S. 3662, House Document No. 119, 55th Congress, Second Session, the Secretary of War, in a letter to the Committee on Military Affairs, stated at page 3:

> "There is, however, no law which subjects them [discharged prisoners] to the discipline of trial by court-martial under the Articles of War, and an important means of making confinement an effective military punishment is, therefore, lacking. To announce to the prisoner that, no matter what he may do, he can not have the term of his confinement extended is a direct encouragement to insubordination and must impair the effect of military imprisonment as an exemplary punishment."

By such language, it is apparent that the authority sought by the military and the authority given by Congress, was similar to the authority vested in the warden of any civilian prison by other Federal Statutes (18 U.S.C.A. 4001; 18 U.S.C.A. 4042). That is, authority to maintain prison discipline by giving summary punishment without the necessity of a jury trial. For example, the Warden of Alcatraz can commit an inmate to solitary confinement without the necessity of first trying him in the Federal District Court. The exercise of such authority by the warden is not subject to review by the courts. (*Williams* v. *Steel*, 194 F2 32; *Henson* v. *Welch*, 199 F2 367.)

Subsequent to the 1916 enactment of Article 2(e) in its present form, the case most relied upon by the respondents was decided. The case of *Kahn* v. *Anderson*, 255 U.S. 1, was decided by the United States Supreme Court in 1921. This case allegedly held that the military had jurisdiction over discharged prisoners and that Article 2(e) was constitutional. However, it is submitted that insofar as the present issues are concerned, the holding in the *Kahn* case should not be controlling for the following reasons:

First, the holding in the *Kahn* case insofar as it relates to jurisdiction in the military to try discharged soldiers, is dicta. It does not appear that Kahn and his co-defendants

had ever been dishonorably discharged from the army. As stated in the decision at page 7:

> "It is contended that, either by implication resulting from the length of the sentences previously imposed and which were being suffered, or by assumption that there was a provision in the sentences to that effect, it resulted that the accused, by the convictions and sentences, ceased to be soldiers and were no longer subject to military law".

Thereafter, the court went on to make the statement cited by the lower court herein in denying your petitioner's writ, to wit:

> "*Even if* their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since if they remained military prisoners they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment". (Emphasis added.)

The court then cites *Carter* v. *McClaughry, supra,* as standing for this proposition. However, as indicated above, the issue here involved was not even before the court in the *Carter* case and therefore could not be decided by it.

From all that appears, the petitioner in the *Kahn* case was still an actual member of the land and naval forces at the time of his second court-martial; thus, the issue as to whether a fully discharged prisoner would be amenable to court-martial jurisdiction was not before the court.

Second, in any event, it is respectfully suggested that the *Kahn* decision should be reconsidered in the light of the more recent *Toth* and *Reid* decisions, *supra.* In reading the *Kahn* case, it does not appear that the court gave

to this important jurisdictional issue the extensive and exhaustive analyses which is demonstrated in the two more recent decisions. Nowhere in the decision does the court attempt to weigh the constitutionality of Article 2(e) in the light of the historical background of the Fifth and Sixth Amendments of the Constitution. (*Covert* v. *Reid, supra*); nor does the court appear to have measured the jurisdictional authority claimed against the loss of the right to a trial by jury (*Toth* v. *Quarles, supra*).

In passing, it should be noted that in the lower court's decision it is stated (R. 36):

> ". . . the Toth case specifically upheld Article of War 2(e)."

Presumably the lower court was referring to the fact that the Supreme Court, in *Toth* v. *Quarles, supra,* cited the *Kahn* case. In this regard, it is submitted that the court, in the *Toth* case, not having the issue before it, did not pass on the question of military jurisdiction over discharged prisoners. From a careful reading it would appear that the court, in the *Toth* case, in referring to the *Kahn* case, was merely summarizing prior decisions in allied fields, without affirming, distinguishing, repudiating, or even expressing an opinion in regard thereto.

Subsequent to the *Kahn* case there were a number of lower court decisions which the respondents contend upheld the constitutionality of Article 2(e). The next case subsequent to *Kahn* was *Mosher* v. *Hudspeth* (10th Cir., 1941), 123 Fed. 2d, 401. In this case petitioner, Mosher, was tried and convicted on May 24, 1920, for a murder committed on February 3, 1920, in Germany. He was sentenced to a dishonorable discharge and life in prison. While awaiting the approval of his sentence and before the discharge was executed, he escaped and committed a robbery. He was

tried and convicted by court-martial for these latter two offenses on June 20, 1920, prior to the actual execution of his dishonorable discharge on July 23, 1920. Since the offenses and the court-martial occurred prior to the execution of the dishonorable discharge, Mosher, like Kahn, was an actual member of the land and naval forces at the time of his court-martial. Therefore, the *Mosher* case, like the *Kahn* case, is readily distinguishable from your petitioner's case.

The court, in the *Mosher* case, did not rule upon the question of whether a discharged prisoner is amenable to court-martial jurisdiction. It merely stated, "military prisoners held for punishment under previous sentences are subject to military law and trial by court-martial for offenses committed during such imprisonment". The court then cited *Kahn* and other cases hereinabove set out.

In 1944 the 10th Circuit again heard the *Mosher* case on a second petition. *Mosher* v. *Hunter*, 143 Fed. 2d, 745. In the second petition the petitioner apparently sought to have the court fix the effective date of his dishonorable discharge and again alleged the lack of jurisdiction in the court-martial. The facts and holdings of the court are the same as they were in the earlier case. However, the court gives different dates as to the effective date of the dishonorable discharge. The extent to which the court went into the question of the constitutionality of Article 2(e) was to cite the *Carter*, *Kahn* and earlier, the *Mosher* decisions. Thus, this decision is of no more benefit to us than the earlier cases upon which its holding is based.

In 1948, a District Court in Pennsylvania decided the case of *Steel* v. *Humphrey*, 80 Fed. Supp. 745. Petitioner, Steel, was convicted by court-martial of murder and sentenced to a dishonorable discharge. "One day after the issuance of the discharge, petitioner was interned in a

United States Federal Penitentiary . . . on a military warrant, signed prior to his discharge . . .". Steel apparently contended that the issuance of his discharge terminated the remainder of his military sentence. This is substantially the same argument as was brought out in *Carter* v. *McClaughry, supra.* The court, in the *Steel* case, merely cited Article 2(e) and stated that petitioner was a prisoner serving sentence adjudged by a court-martial. This decision is readily distinguishable on the same basis as the *Carter* decision and can be sustained on the basis that once jurisdiction attaches it continues until the sentence adjudged has been carried out.

In *MacDonald* v. *Lee* (Fifth Cir., 1944), 217 Fed. 2d, 619, the petitioner was tried and convicted by court-martial in 1951 for "behaving while a military prisoner with disrespect toward his superior officer . . . and of offering violence against a superior officer . . .". The petitioner contended that this court-martial lacked jurisdiction on the basis that he had previously received a dishonorable discharge in 1947. Regarding the jurisdictional issue, the Fifth Circuit merely quoted the *Kahn, Mosher* and *Carter* decisions. Other than citing the language of these decisions and the provisions of Article 2(e), it does not appear that the court even weighed the constitutionality of the article. Thus, it would appear for our purpose that this decision is of little, if any, benefit.

From a reading of all of these cases, it does not appear that the question of jurisdiction of the military over a discharged prisoner charged with a capital offense has ever been decided. The decisions all either deal with non-capital offenses or are cases where there was no executed discharge.

With due regard for the foregoing historical background, the following argument is submitted as to the unconstitutionality of Article of War 2(e). The issue is as follows:

On the one side it is contended that Congress can enact a law authorizing the military to court-martial, for murder, a fully discharged prisoner, as Congress has authority to "make rules for the Government and Regulation of the Land and Naval Forces". Constitution Art. 1, Section 8, Cl. 14.

On the other hand, it is contended that Congress cannot constitutionally make such a law, as a discharged prisoner is no longer a member of the land and naval forces, but is a member of the civilian class and thus entitled to a presentment or indictment (Constitution, Art. 5), and to a trial by jury (Constitution, Art. 6), when charged with a capital offense.

It has been held that "The Constitution was written to be understood by the voter", and that, "its words and phrases were used in their usual and ordinary, as distinguished from their technical meaning". *U. S.* v. *Sprague*, 282 U.S. 716, 731.

It has also been held that "The term 'Land and Naval Forces' refers to persons who are *members* of the Armed Forces", *Reid, supra,* page 20. (Emphasis added.)

It has been stated that "The Fifth Amendment clearly distinguishes the military from the civil class . . . (and) recognizes no third class which is part civil and part mili tary", *Reid, supra,* page 19, F.N. 36. (Emphasis added.)

Since there can be no third class, is a dishonorably discharged prisoner a member of the clearly distinguishable military class, or a member of the clearly distinguishable civil class?

The Judge Advocate General of the Army has answered this question a number of times. For example, the Judge Advocate has held:

1. A dishonorably discharged prisoner cannot be tried for absence without leave under the 61st Article of War, as the character of the offense presumes a duty to be at an appointed place and a discharged ex-soldier is not in confinement because of any duty. He is in confinement because of compulsion alone. Dig. Op. JAG. April, 1946, Para. 419 (2) page 93.

2. A dishonorably discharged prisoner cannot be court-martialed for disobeying the order of a non-commissioned officer under the 6th Article of War, "since the accused was not a soldier at the time of the offense alleged. The offense is limited in its application to soldiers". Dig. Op. JAG 1912-40, Sec. 394 (2).

3. "Under the current policy of the War Department [1942], disciplinary barracks are entitled to special services equipment (purchased from appropriated funds) for the use of general prisoners confined thereat, but *not* discharged from the service. Such equipment may not be issued for the use of a general prisoner confined thereat with a dishonorable discharge executed, as such general prisoners are not members of the military forces of the United States".

4. A dishonorably discharged prisoner who is killed by the enemy is not in the status of a member of the military killed in action. "In the absence of restoration to the army by the Secretary of War . . . the accused was not in the military service at the time of his death. A dishonorably discharged soldier becomes a civilian even though retained in confinement under sentence of a general court-martial". S.P.J.A.G. 253, 26 June 1942, I Bull. J.A.G. 100.

Colonel Winthrop in his *Military Law & Precedent*, 2d, ed., 1920, has also answered this question. At page 424,

the Colonel, in dealing with the question of the authority in the military to confine a prisoner after imposing a dishonorable discharge, states:

> "The legality of such imprisonment consists in the fact that, after the discharge, the party is held confined not as a military prisoner, but as a *civilian* convict—as an offender against the laws of the United States under the sentence of a tribunal authorized by public statute to punish at discretion the offense committed". (Emphasis added.)

At page 433 Colonel Winthrop again answers the question. Here, the Colonel is dealing with the question of the "nature and authority for" a dishonorable discharge. He states:

> "This punishment corresponds to dismissal in the case of an officer, in that it expels the offender with disgrace from the army and remands him to status of a civilian".

Since there is no dispute but that petitioner was discharged from the service and in view of the above authorities, it seems contradictory to say that he was a member of the land and naval forces.

The court, in the *Reid* case, stated, quoting from Colonel Winthrop (footnote No. 38):

> "Can (the power of Congress to raise, support and govern the military forces) be held to include the raising or constituting and the governing nolens volens, in time of peace, as a part of the army of a class of persons who are under no contract for military service . . . who render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity

> . . . in the opinion of the author, such a range of control is certainly beyond the power of Congress under (the Constitution)."

If the wife of a serviceman is not amenable to military jurisdiction because she is a civilian, then how can a discharged prisoner be made amenable to military jurisdiction? The prisoner, like the dependents, in *Reid* v. *Covert, supra,* is "under no contract for military service", as his contract with the service has been expressly repudiated by the service. The prisoner, like the dependents, "renders no military service, performs no military duty and receives no military pay". Such a discharged prisoner, like the dependents, "lives with servicemen on a military base", however, according to the Constitution's reasoning, this is insufficient basis to classify a prisoner as a person who is a "member" of the land and naval forces. As stated by this court in *Reid* v. *Covert, supra*:

> "In the light of this history, it seems clear that the founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval forces'. Such a latitudinarian interpretation of these clauses would be at war with the well established purpose of the founders to keep the military strictly within its proper sphere, subordinate to civil authority. The constitution does not say that Congress can regulate 'the land and naval forces and all other persons whose regulation might have some relationship to maintenance of the land and naval forces'. There is no indication that the founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over

civilians who might have some contract or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America".

The lower court's reasoning as to your petitioner's status; that is, as to whether he was a member of the land and naval forces, is as follows:

"The technical dishonorable discharge constituted a severance from the military for certain purposes, including the deprivation of various benefits, but it is unthinkable to regard it as a vitiation of all military authority over the petitioner" (R. 38).

The court then went on to cite *Mosher* v. *Hunter, supra,* which has previously been discussed in this brief.

In the first instance, it should be noted that there was nothing technical about petitioner's dishonorable discharge. It was adjudged by a general courts-martial, approved by the President, fully executed and in hand delivered to petitioner. It fully and finally deprived him of all his rights and benefits as a member of the armed forces. Secondly, it is not contended by your petitioner that this discharge vitiated the military of all authority over him. Petitioner's only contention is that such discharge vitiated the authority in the military to try him for a capital offense committed within the continental United States, without the benefit of his constitutional guarantees. Your petitioner will freely admit that the military retained certain authority over him, including certain disciplinary authority, so long as he was confined in a military prison. But such authority is the same authority which the warden of any civilian prison has over civilian inmates of such prison.

The implication of the lower court's ruling is that the necessity of the situation, creates a "third class which is

part civil and part military". However, the court in the *Reid* case held that mere expedience or convenience is no justification for a denial of a basic constitutional right, and implied that there is no such third class.

It would seem that military jurisdiction should be limited to the least necessary for the occasion. Considering the language of the Supreme Court in the *Toth* case, as to the high regard for the right to a trial by jury, what was the overwhelming necessity which compelled the court-martialing of your petitioner for a capital offense occurring within the continental United States in 1949? What compelling necessity precluded the military from delivering him to the local Federal District Court for trial by jury in the tradition that existed in such matters at the time of the adoption of our Constitution?

Time of Peace

The 92nd Article of War provides that the military cannot try a person for "murder or rape committed within the geographical limits of the United States in time of peace", 10 U.S.C. 1564. Your petitioner was tried for murder at Camp Cook, California, on June 10, 1949; the issue is whether June 10, 1949, was "time of peace" as the term is used in the 92nd Article of War. The Court of Appeals held that such date was not "time of peace". The court based its holding on the case of *Kahn* v. *Anderson, supra,* which stated that time of peace meant "peace in the complete sense, officially declared". From this, the Court of Appeals reasoned that we did not arrive at "time of peace" after World War II until the signing of the German and Japanese Peace Treaties in 1951. (65 Stat. 451, 66 Stat. C3, 66 Stat. C31, 67 Stat. C24.) Thus, it is the lower court's opinion that despite the actual condition of peace or war, the determining factor is the technical existence or nonexistence of war, dependent upon whether a peace

treaty has been signed. That such is not the rule is demonstrated by a close examination of the cases in which the Supreme Court and the United States Court of Military Appeals has been called upon to interpret statutes which contain the words, "in time of peace" and "in time of war".

It is the contention of the appellant that the determination of the existence of the state of war, in interpreting a particular statute, must be based upon the consideration of a number of factors in the light of the Congressional intent, or the reason behind the particular statute; that no one event, such as a treaty of peace can be said to be the determining factor for the termination of war in the interpretation of all statutes. In this regard, see *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, wherein the court states:

> "Assuming that the implied power to enact such a prohibition must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace (United States v. Anderson, 9 Wall. 56, 70; The Protector, 12 Wall. 700, 702; Hijo v. United States, 194 U. S. 315, 323), but upon some actual emergency or necessity arising out of the war or incident to it, still, as was said in Stewart v. Kahn, 11 Wall. 408, 507, "The power is not limited to victories in the field and the dispersion of the [insurgent] forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress".

The heart of the *Hamilton* decision is contained on page 163 of the decision wherein the court states:

> "In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not

yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the manpower of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid."

This *Hamilton* case is the case most frequently used by the Supreme Court and other courts in determining what constitutes "time of peace" and "time of war". From the above language of the court, it is readily apparent that the court, in determining such "time of war", considers a number of factors in the light of the particular statute being interpreted. The rule is not as the lower court would have us believe, that "time of war" is only terminated on the formal declaration by the President. Perhaps the clearest statement of the rule is that of Justice Black, in his dissent in *Ludecke* v. *Watkins*, 335 U.S. 160 at 173:

"But this 1798 Statute, unlike statutes passed in later years, did not expressly prescribe the events which would for statutory purposes mark the termination of the 'declared' war or threatened invasions. See Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 165 n. 1. *In such cases we are called on to interpret a statute as best we can so as to carry out the purpose of Congress in connection with the particular right the statute was intended to protect,* United States v. Anderson, 9 Wall. 56, 69-70; The Protector, 12 Wall. 700, 702, or the particular evil the statute was intended to guard against. McElrath v. United States, 102 U.S. 426, 437, 438. See Judicial Determination of the End of the War, 47 Col. L. Rev. 255." (Emphasis added.)

That this is the rule is conceded by the majority in the *Ludecke* case, wherein they state:

"The state of war *may* be terminated by treaty *or* legislation *or* Presidential Proclamation". (Emphasis added.)

Here, the majority is stating that any one of these three things *may* herald the end of war. They do not hold that any one of them must, or necessarily does, mark the end of war. The majority goes on to pose the precise question which is involved in appellant's case:

"Whether and when it would be open to this court to find that a war, formally kept alive, had, in fact, ended, is a question too fraught with gravity even to be adequately formulated when not compelled".

The court goes on to quote the above language used by the court in the *Hamilton* case, *supra*, to the effect that a number of factors are considered in determining when a war terminates.[1]

This interpretation of "end of war" is in accord with the findings of the United States Court of Military Appeals. See *U. S.* v. *Gyers*, 15 C.M.R. 220, wherein it was held:

". . . Finally, in view of the fact that the phrase 'time of war' appears in several distinct Articles in the Uniform Code, supra—e.g., Articles 43, 90 and 106—we are constrained to point out that its meaning, as it may be used in any particular Article, must be determined with an eye to the goal toward which that Article appears to have been directed. This cautious and individualized approach toward Articles of the Code—far from being incongruous—seems dictated by the precedent of Congressional intent in dealing with the problems of World War II".

[1] See discussion in this regard in 47 Col. L. Rev. 225.

Regarding the other cases cited by appellee; namely, *Knauff* v. *Shaughnessy*, 338 U.S. 138, and *Woods* v. *Miller Company*, 333 U.S. 138, it is to be noted that on the point here in issue (i.e. whether the war had ended), the court in the *Knauff* case cited the decision in the *Woods* case. Justice Black, in the *Ludecke* case had the following to say concerning the *Woods* decision, see footnote 4, page 178:

> "The court cites Woods v. Miller Company, 333 U.S. 138, as having held that the War with Germany has not yet terminated. I find no such holding in the opinion and no language that even suggests such a holding".

The bulwark of appellee's position as to "time of war" and "time of peace" can be found in the cases of *Kahn* v. *Anderson*, 225 U.S. 1 and *Givens* v. *Zerbst*, 255 U.S. 11. Both cases were decided on January 31, 1921. The issue as to what constitutes "time of peace" was one of several issues involved in each case. However, in neither case did the court delve extensively into the question nor seek to interpret the article in the light of Congressional intent, or the reason behind the article. In the *Kahn* case the court simply stated:

> "That complete peace in the legal sense had not come to pass by the affect of the Armistice and the cessation of hostilities is not disputed, Hamilton v. Kentucky Distilleries Co., 251 U.S. 376".

And the court further stated:

> "We are of the opinion that qualification signifies peace in the complete sense, officially declared".

It is to be noted that the court cites the *Hamilton* case. The *Hamilton* case, as above noted, indicates that the termination of a state or war depends upon a number of

factors considered in the light of the reason for the statute or the Congressional intent behind the particular statute being interpreted.

A puzzling aspect of the *Kahn* case is what the court meant when it stated, "peace in the complete sense, officially declared". As noted in the majority opinion in the *Ludecke* case, *supra*:

> "A war *may* be terminated by treaty *or* legislation *or* Presidential Proclamation". (Emphasis added.)

Any one of these may be "peace, officially declared". In the instant case, would the official declaration of peace be the Presidential Proclamation of December 31, 1946 (12 Fed. Dig. 1), Cessation of Hostilities, or the Presidential Proclamation of April 28, 1952 (66 Stat. C. 31), or the Treaty in San Francisco with Japan on September 8, 1951, or the Presidential Proclamation of October 24, 1951 (66 Stat. C. 3), or the Peace Treaty with Germany, or the Joint Resolution of Congress of July 25, 1947 (61 Stat. 449), or any one of the numerous other legislative acts, treaties or Presidential Proclamations which occurred between 1945 and 1951. Each of these statutes, treaties and proclamations terminate the war for its own particular purpose. None of them expressly mentions Article of War 92. Therefore, it is submitted that the court must look to the reason for the enactment of Article 92.

Lastly, in regard to the *Kahn* and *Givens* cases, it is pointed out that both of these cases are clearly distinguishable from the instant case on their facts. Article of War 92 states, in part, as follows:

> "That no person shall be tried . . . for murder or rape committed . . . in time of peace." (Emphasis added.)

In the *Kahn* case, the offense was committed on July 29, 1918; the accused was placed on trial on November 4, 1918. In the *Givens* case the date of the offense is not shown; however, the court was convened on October 30, 1918. Therefore, it is to be noted that since not even the Armistice was signed until November 11, 1918, there is no question at all but that the offense was committed and the trial commenced in time of actual war. Therefore, the decision in the *Kahn* case can be sustained on an entirely different principle than that which the lower court attributes to it. The holding of the court in the *Kahn* case can be sustained on the same principle that the court laid down in the case of *Carter* v. *McClaughry, supra.* As previously noted the principle of the *Carter* case is that jurisdiction, once attached persists in the particular court until the completion of the trial and the carrying out of the sentence. In the *Kahn* case, the court-martial jurisdiction attached in time of actual war as the court was convened prior to the cessation of hostilities. Once this jurisdiction had attached it continued in existence until completion of the trial and the carrying out of the sentence. The cessation of hostilities and the signing of the Armistice in the middle of the trial did not vitiate the jurisdiction which had previously attached. It is interesting to note that the *Kahn* decision cites *Coleman* v. *Tennessee*, 97 U.S. 509. According to the *Carter* decision, the rule of the *Coleman* case is that once jurisdiction attaches it continues until the sentence is carried out. The principle of the *Carter* and *Coleman* cases, though applicable to the *Kahn* and *Givens* cases, is inapplicable to your petitioner's case. The court-martial in your petitioner's case was not convened until some four years after the cessation of hostilities and the signing of the surrender.

In the instant case, the Germans surrendered on May 8, 1945 (50 Stat. 1857), and the Japanese surrendered on

September 2, 1945 (59 Stat. 1733). The alleged offense did not occur until June 10, 1949, and the trial was not held until September 10, 1949. Can it be said that the Supreme Court in the *Kahn* and *Givens* cases would have reached the same result if the offense and court-martial had taken place some four years after the German Armistice?

In 1951 the Congress enacted the Uniform Code of Military Justice and set up a new system of Military Courts to try persons in the military. The highest of the Military Appellate Courts is the United States Court of Military Appeals. This "Supreme Court of the Military" has as its only function the interpretation of law as applicable to military personnel. Because such are the limits of this court's endeavors, its members have become imminently proficient in this field of law; therefore, great weight should be given their decisions. The Court of Military Appeals has dealt with the subject of "time of war" and "time of peace" on several occasions. The most recent cases are: *United States* v. *Shell*, 23 C.M.R. 110, decided on March 15, 1957, and *United States* v. *Busbin*, 23 C.M.R. 125, also decided on March 15, 1957. In the *Shell* case, *supra*, the court stated:

> "In holding that offenses committed during the Korean conflict were perpetrated during a time of war within the meaning of the language of the Code . . . we reasoned that war does not result only from a formal declaration by Congress, but can exist, in fact, without a declaration, *and that its existence is to be determined by the realities of the situation as distinguished from legalistic niceties.*" (Emphasis added.)

> "United States v. Bancroft, 3 U.S.C.M. 3, 11 C.M.R. 3; United States v. Gann, 3 U.S.C.M.A. 12, 11 C.M.R. 12; United States v. Ayers, 4 U.S.C.M.A. 220, 15 C.M.R.

220; United States v. Taylor, 4 U.S.C.M.A. 232, 15 C.M.R. 232. The factors which, considered collectively, compelled our finding of a time of war, are set out in Bancroft, supra, and its allied cases. Of crucial importance in all of the cases, however, was the existence of armed hostilities against an organized enemy".

"Manifestly, if, in the absence of formal Executive or Legislative action, a collection of factors compels a conclusion that a state of war is being maintained, when those factors or a substantial part thereof no longer exist, a contrary deduction may be required".

"We, therefore, hold that the Armistice in Korea on July 27, 1953, ended those actual hostilities essential to a finding of time of war, and hence that for the purposes of military law the state of war terminated on that date".

This case becomes of added significance, when it is considered that it overruled the prior military case of *United States* v. *Smith*, 17 C.M.R. 406, decided September 16, 1954. In the *Smith* case the Board of Review held that the Korean War was not ended by the Armistice of July 27, 1953 " . . . inasmuch as war ends only by treaty, legislation, or specific Presidential Proclamation. *United States ex rel Knauff* v. *Shaughnessy*, 338 U.S. 537; *Ludecke* v. *Watkins*, 335 U.S. 160; Kahn v. Anderson, 225 U.S. 1". (Emphasis added.)

In the *Busbin* case, *supra*, the court makes the same holding as in the *Shell* case. See also *U. S.* v. *Johnson*, 6 C.M.R. 810 and *United States* v. *Meadows*, 2 C.M.R. 306. In the instant case the court is called upon to decide what constitutes "time of war" and "time of peace" as these terms are used in a military code. In the *Shell* and *Busbin* cases, the highest of the military has decided that such terms,

when used in military law, constitute actual peace or war and not technical peace or war. To now decide that the military court erred in its interpretation of this language and to hold, as the lower court would suggest, that time of peace, as used in the Military Code, means technical peace, evidenced by a formal Presidential Proclamation, would be to raise havoc with all of the military decisions which have been based upon the reasoning as is evidenced in the *Shell* case.

The lower court attempted to distinguish the *Shell* case and the *Busbin* case on the grounds that they arose during the Korean conflict. The lower court's reasoning seems to be that since World War II was commenced by a proclamation, it could only be terminated by proclamation and that there was therefore no room for judicial interpretation as to such termination; conversely, it reasoned that since the Korean conflict was not commenced by proclamation, it was not necessary to terminate it by proclamation and therefore the Court of Military Appeals could indulge in interpretation and consider a number of factors in determining the end of war. According to the lower court, this was what was meant by the Court of Military Appeals when it stated:

> "In the absence of formal executive or legislative action . . . a collection of factors . . . "

That the Court of Military Appeals did not intend such a limited meaning to its decision is demonstrated by its language when it stated:

> "*. . . and that Congress, when it used the phrase in time of war in the Military Code, intended the phrase to apply to that state, regardless of whether it was initiated or continued with or without a formal declaration.*" (Emphasis added.)

The essence of the lower court's distinction of the *Shell* case is that there was an absence of political pronouncement after the Korean War. In answer to this, it need only be pointed out that there was an absence of a proclamation of peace for six years after World War II. Who is to say that there will be no proclamation of peace within six years after the Korean War?

If, in the light of the foregoing, it can be assumed that "time of peace" and "time of war" are technical terms which must be interpreted in the light of the Congressional intent involved in the particular statute being interpreted, the only remaining question is as to the Congressional intent behind the enactment of Article of War 92. That military courts are courts of special and limited jurisdiction is axiomatic. They have only such jurisdiction as is expressly conferred upon them. The Congress, in enacting the Articles of War, saw fit to withhold from the military courts jurisdiction over murder and rape committed within the continental United States in "time of peace". The obvious reason that Congress withheld such jurisdiction from the military is that the Congress was aware of the fact that persons tried by the military are not afforded many of the basic Constitutional guarantees that a person has when tried in a civilian court.[2]

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[2] That the Supreme Court has also recognized this is demonstrated by the language of the court in *Toth* v. *Quarles, supra;* "We find nothing in the history of Constitutional treatment of military tribunals which entitled them to rank along with Article 3 courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property . . ." "And, conceding to the military personnel the high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in Federal Courts".

The primary of these is the right to a trial by jury. The Congress obviously felt that when a person was being tried for a capital offense he should be afforded these basic Constitutional guarantees if it were at all practical.[3] The

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[3] See Footnote 20, *Toth* v. *Quarles, supra,* "The historical background of this country's preference for civilian over military was impressively presented in the argument of counsel and opinion of court in *Ex parte Milligan,* 4 Wall. 2, 121. And see *Duncan* v. *Kahanamoku,* 327 U.S. 304".

See also the following discussion between General Crowder and the Senate Committee, appearing in Senate Report, 64th Congress, First Session, pages 32 and 33:

"The General Staff has further revised the article so as to vest this jurisdiction in courts-martial, thus making the jurisdiction of the court-martial concurrent with the civil courts, as to both capital and noncapital crimes. I do not concur in this extension of the court-martial's jurisdiction, and the Secretary of War has expressed disapproval of the change in his letter transmitting this revision to the Congress."

"In other words, the General Staff has undertaken to say that capital crimes committed here at Fort Myer or anywhere else within the geographical limits of the country shall be tried as well by court-martial as by civil courts. We never have had that law, and I doubt very much whether it is desirable to divorce the Army to that extent from accountability in the civil courts. But I am very much in favor of doing it when the Army is outside of our geographical limits proper; and that is the proposition that I stand for, and not the proposition that is here submitted."

"The Chairman. What reasons do the General Staff assign?
Gen. Crowder. I have not seen any reason. They simply recorded a recommendation. I can easily understand the reason, viz., a desire that the Army may handle its own criminal business and doubtless border conditions to the south of us entered into their consideration and influenced their conclusions. I concede the necessity for autonomy in these matters when the Army is serving under unusual conditions, away from the protection of Constitutionally guaranteed rights."

"Senator Colt. Yes.
Gen. Crowder. But not when they are serving here. I think that here in the United States proper the Army should be under the same accountability as civilians for capital crimes."

"Senator Colt. That runs all through the common law, the civil law, in regard to capital crimes, I think. Of course I can understand that the General Staff perhaps would like to take all the power they could in a court-martial."

Congress was aware of the fact that in certain instances it would not be practical to compel the military to allow one of its members to be tried in a civilian court.[4]

The instances when Congress concluded that such would be impractical were when the offenses occurred outside the geographical limits of the United States or when the offenses occurred within the States of the Union, but, when due to war, the local courts were closed.[5] The impracticability of a civilian trial in such instances is obvious.

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[4] See Senate Reports, 63rd Congress, Second Session, General Crowder, the Judge Advocate General stated at page 98:

"It will be noted that under the existing law—articles 58 and 62—courts-martial have no jurisdiction over capital crimes in time of peace. My proposition, explicitly stated, is to give courts-martial jurisdiction of the only two crimes made capital by the new penal code of the United States, viz., murder and rape, when committed by persons subject to military law in our foreign possessions, leaving these crimes to be tried by civil courts when committed within the geographical limits of the States of the Union and the District of Columbia. Under the present condition of the law, if one of our soldiers stationed in the Philippines commits a capital offense there, he goes before a court consisting of a single judge, to be tried for his life, and in a majority of cases it will be a native judge. The soldier will be tried under a code which has not been Americanized in all respects and by a court administering what is essentially an alien jurisprudence".

On page 99, the General stated:

"Gen. Crowder. Within the United States and the District of Columbia capital crimes will continue to be punished by the civil courts under lines 4, 5, and 6. The new article giving authority to courts-martial to try these crimes is operative only in our foreign possessions; the language of the article would make it operative in Alaska. I do not insist upon Alaska being included, but I think as long as conditions there are unsettled there would be some propriety in providing that soldiers stationed there should be tried for these offenses by their own officers. It is not however, a provision that I would insist upon".

[5] See argument of David Dudley Field, counsel for petitioner *Ex parte Milligan, supra;* in his argument, Mr. Field cites a num-

However, we can assume, in light of the fact that it was only comparatively recently that Congress granted to the military the authority to try a soldier for any civil crime,[6] that Congress only grudgingly granted to the military this limited jurisdiction over civil capital offenses. Considering the background referred to in the above footnote, it is safe to assume that Congress, in granting this limited jurisdiction over civil capital offenses, was dealing with realities and not technicalities. Surely Congress did not intend that a mere technical or fictional state of war[7] would deprive the soldier of the basic Constitutional guarantees to which he would be otherwise entitled. It would not seem that a fictional or technical state of war should be allowed to protect the evil that Congress sought to guard against, nor defeat the right that Congress sought to protect.

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ber of early English authorities to the effect that when the civilian courts are open it is time of peace in judgment of law.

Also, see Congressional Record prior to the enactment of the 1916 Articles of War, which included the 92nd Article, here involved—Senator Cummings, in a discussion involving military jurisdiction over offenses occurring within the continental United States and the authority in time of peace and in time of war, states:

> "I have no knowledge about the subject at all; but I should be very sorry to see the civil courts supplanted in time of peace by courts-martial where the civil courts are open and prepared to try and acquit or convict, as the case may be". Congressional Record, Vol. 53, pt. 11, 64th Congress, First Session, July 6-24, 1916, p. 11511.

[6] See *Covert, supra,* pg. 23 to pg. 32 for historic preference of civil over military trials and the grudging manner in which the military was granted jurisdiction over any civil crime. See also *Toth* v. *Quarles,* 350 U.S. 11, pg. 22.

[7] Justice Black, in his dissent in the *Ludecke* case, *supra,* at pg. 175, has this to say of the situation as it existed on June 21, 1948: "I think the idea that we are still at war with Germany, in the sense contemplated by the statute controlling here, is a pure fiction". And again in the same decision, pg. 178, "Of course, it is nothing but a fiction to say that we are now at war with Germany."

The Supreme Court, in the case of *Toth* v. *Quarles*, *supra*, stated:

> "Free countries the world over have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service".

Congress, in enacting Article of War 92, sought to restrict military tribunals from trying capital offenses, except when it was essential to the maintenance of discipline in time of actual war. What was the circumstance existing in 1949 which was so essential to the maintenance of military discipline that a soldier could not be tried in a civilian court as directed by Congress; or, to be more specific, what conceivable adverse effect could there have been upon army discipline to take the appellant 150 miles to the United States District Court for the Southern District of California to try him for the alleged capital offense?

CONCLUSION

That insofar as Article of War 2(e) authorized the trial of a dishonorably discharged prisoner for a capital offense, said article was unconstitutional. That the court-martial convened under the provisions of such article was unconstitutional when the offense charged was a capital offense. That therefore a writ of habeas corpus should issue, releasing petitioner from the confinement imposed by this void court-martial.

For the purposes of interpreting Article of War 92, the United States was at peace in 1949. That, therefore, the military lacked jurisdiction over the person and subject matter and its trial by court-martial was void. That, therefore, a writ of habeas corpus should issue, releasing

petitioner from the confinement imposed by this void court-martial.

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APPENDIX A

Article of War 2(e) (10 U. S. Code 1473)

ART. 2. *Persons Subject to Military Law.* The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law," whenever used in these articles; provided, that nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States Naval jurisdiction unless otherwise specifically provided by law.

(e) All persons under sentence adjudged by courts-martial;

APPENDIX B

Article of War 92 (10 U. S. Code 1564)

ART. 92. *Murder—Rape.* Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct; provided, that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.